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No. 09-

IN THE

Supreme Court of the United States

DEMARICK HUNTER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under *Begay v. United States*, 128 S. Ct. 1581 (2008), a prior conviction for carrying a concealed weapon constitutes a "violent felony" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e).

2. Whether a legally erroneous application of ACCA, which resulted in a mandatory minimum sentence five years above the otherwise applicable statutory maximum for the offense, violates due process.

3. Whether the decision of the Eleventh Circuit denying a certificate of appealability ("COA") on habeas review should be summarily reversed when the Solicitor General has confessed that it was error to deny the COA.

PARTIES TO THE PROCEEDING

There are no additional parties to the proceedings other than those listed in the caption.

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OPINIONS BELOW

The decision of the Eleventh Circuit denying petitioner's motion for a certificate of appealability ("COA") after remand from this Court is reported at *United States v. Hunter*, 559 F.3d 1188 (11th Cir. 2009). App. 1a-4a. The Eleventh Circuit's earlier denials of the COA are not reported. App. 5a, 7a, 8a. The district court's denial of habeas relief, and its denial of a COA, are not reported. App. 9a, 10a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on February 24, 2009. App. 1a-4a. On May 6, 2009, Justice Thomas extended the time to file a petition for a writ of certiorari to and including June 24, 2009. On June 12, 2009, he granted a further extension to and including July 24, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides in relevant part:

> (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in

> section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

Title 28 U.S.C. § 2253, governing appeals in a habeas proceeding, provides in relevant part:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . .
>
> . . .
>
> (B) the final order in a proceeding, under section 2255[.]
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

STATEMENT OF THE CASE

This petition represents the second time petitioner Demarick Hunter has sought relief from this Court to correct a concededly unlawful sentence that more than tripled his term of imprisonment. In a misapplication of the Armed Career Criminal Act ("ACCA"), Hunter was sentenced under its mandatory minimum provisions to 188 months in prison, based upon a ruling that his two prior convictions

for carrying a concealed weapon were "violent felonies" under ACCA. The Solicitor General has acknowledged that that holding was in error under *Begay v. United States*, 128 S. Ct. 1581 (2008). All of the other circuits that have ruled on the issue have held that firearm possession does not qualify as an ACCA predicate offense. And the Eleventh Circuit itself has since agreed. But the court below again refused to grant Hunter a certificate of appealability ("COA") to raise the error on habeas review, even after this Court vacated and remanded its earlier denial. The Eleventh Circuit's misguided efforts to preserve an admittedly unauthorized and unjust sentence should be firmly rejected by this Court. This is the rare case in which summary reversal is the only appropriate remedy.

1. On June 8, 2004, following a jury trial in the United States District Court for the Southern District of Florida, Hunter was convicted of possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Hunter had been a passenger in a vehicle on the evening of August 15, 2003, in Miami-Dade County, Florida, when the vehicle was stopped by the police for a possible traffic violation. In the course of the traffic stop, the police observed an empty gun holster in the back seat of the vehicle where Hunter had been seated, and a gun beneath the right front passenger seat. At trial, the driver of the vehicle testified that Hunter had thrown a gun onto the right front passenger seat before he had pulled over and that the other passenger had attempted to conceal the weapon under that seat. It was also established at trial, by stipulation of the parties, that Hunter had a prior felony conviction.

The dominant legal concern at sentencing was Hunter's criminal history. Without the application of any sentencing enhancement under ACCA, Hunter faced a statutory sentencing range of zero to 10 years. 18 U.S.C. § 924(a)(2). Hunter, however, had two prior convictions in 1996 and 1999 for carrying a concealed firearm and one prior conviction in 2001 for possession with intent to sell or deliver cocaine. The district court decided that these three prior convictions qualified as "violent felonies" or "serious drug offenses" under ACCA, which made Hunter subject to a 15-year mandatory minimum sentence. 18 U.S.C. § 924(e)(1). These predicate offenses therefore added a *minimum* of 5 years to Hunter's statutory exposure.

The court also determined that the predicate offenses constituted "crimes of violence" or "controlled substance offenses" under the Sentencing Guidelines.[1] Accordingly, Hunter's offense level was set at 33 because of his three prior felony convictions, including the concealed weapons offenses. U.S.S.G. § 4B1.4(b)(3)(B). Hunter also had a criminal history category of IV. U.S.S.G. § 4A1.1. Based upon an offense level of 33 and a criminal history category of IV, Hunter's applicable Guidelines range was 188 to 235 months.[2]

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[1] The definitions of "violent felony" under ACCA and "crime of violence" under the Sentencing Guidelines are identical in relevant part. Both apply to "any crime punishable by imprisonment for a term exceeding one year . . . that . . . otherwise involves conduct that presents a serious potential risk of physical injury to another." *See* 18 U.S.C. § 924(e)(2)(B); U.S.S.G. § 4B1.2(a); *see also United States v. Townsley*, No. 08-13517, 2009 WL 929986, at *2-3 (11th Cir. Apr. 8, 2009) (unpublished).

[2] The sentencing calculations detailed above and in footnote 3 are based upon the figures in the government's appellate

The district court sentenced Hunter to 188 months, which was at the low end of the Guidelines range and also met the 15-year mandatory minimum term required by ACCA. If Hunter's prior concealed weapon convictions had not been treated as predicate offenses for purposes of ACCA, or aggravating factors under the Sentencing Guidelines, Hunter would have been subject to a Guidelines range of 63-78 months—more than 10 years less.[3] Indeed, Hunter, who has been in custody since his arrest in August 2003, has now served nearly six years in prison, which already may exceed the lawful sentence.

2. Hunter appealed his conviction and sentence to the Eleventh Circuit. He challenged his sentence on the ground that the mandatory minimum sentence violated the constitutional holding in *United States v. Booker*, 543 U.S. 220 (2005). The Eleventh Circuit affirmed.

Hunter did not challenge on direct appeal the sentencing enhancements under ACCA or the Sentencing Guidelines relating to his prior convictions for carrying a concealed weapon. At the time of his

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brief on direct review, and are assumed to be correct for the purposes of this petition.

[3] In the absence of the statutory and Guidelines enhancements, Hunter's base offense level would have been set at 20 because he committed the offense after having sustained one felony conviction for a controlled substance offense. U.S.S.G. § 2K2.1(a)(4). He would have received an extra two points (to 22) because the firearm had a partially obliterated serial number. *Id.* § 2K2.1(b)(4). Because of his eight criminal history points, his criminal history category would have remained at category IV. *Id.* § 4A1.1. Based upon an offense level of 22 and a criminal history category of IV, Hunter's applicable Guidelines range would have been 63-78 months.

appeal, the established law in the Eleventh Circuit, as set forth in *United States v. Hall*, 77 F.3d 398 (11th Cir. 1996), held that carrying a concealed weapon created a "serious potential risk of physical injury" and thus constituted a predicate offense—a "violent felony"—for purposes of the enhancement provisions of ACCA. *Hall*, 77 F.3d at 401-02.

3. On October 6, 2006, Hunter filed a pro se petition for a writ of habeas corpus, asserting that his two prior convictions for carrying a concealed weapon did not qualify as violent felonies under ACCA or the Sentencing Guidelines. He further alleged that both his trial and appellate counsel rendered ineffective assistance by failing to challenge those enhancements.[4] The district court denied the petition, holding that his challenge to his sentence was foreclosed under *Hall*, *supra*. For similar reasons, it rejected the ineffective assistance claim. App. 10a-11a, 12a-19a.

Thereafter, Hunter moved pro se in the district court for a COA on the question of whether *Hall* remained good law after *Leocal v. Aschroft*, 543 U.S. 1 (2004), which interpreted a statutory sentencing enhancement analogous to the ACCA provision. The district court denied the motion for a COA in a short form order. App. 9a. On December 4, 2007, the Eleventh Circuit summarily denied issuance of a COA in a single-sentence order, stating that Hunter "has failed to make a substantial showing of the denial of a constitutional right." App. 8a. (citing 28 U.S.C. § 2253(c)(2)). The court adhered to that decision upon reconsideration in an almost identical short form order. App. 7a.

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[4] Hunter also claimed a Speedy Trial Act violation that is not relevant to this petition.

On April 23, 2008, Hunter filed a pro se petition for writ of certiorari, asking this Court to determine whether a concealed weapon conviction constituted an ACCA predicate offense. In response, the Solicitor General recommended that the case be GVR'ed for reconsideration in light of *Begay v. United States*, 128 S. Ct. 1581 (2008). As the Solicitor General noted, *Begay* limited the residual provision in the statutory definition of a "violent felony" under ACCA to only those felonies that present "a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). This Court held that a conviction for driving while under the influence of alcohol or drugs is not a violent felony under the statute. Moreover, by that time, the Eleventh Circuit had already reconsidered in light of *Begay* whether carrying a concealed firearm qualified as a crime of violence under the Sentencing Guidelines, holding that it did not. *See United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). On November 17, 2008, this Court GVR'ed for reconsideration in light of *Begay*. App. 6a.

4. On remand, surprisingly, the Eleventh Circuit did not solicit further briefing from either party. Instead, it summarily denied Hunter's motion for a COA yet again.[5] The Eleventh Circuit acknowledged that "*Begay* provides good reason to conclude that [Hunter] was erroneously sentenced as an armed career criminal," and that its own precedents to the contrary "had been undermined to the point of abrogation." App. 2a. It nevertheless held that a sentencing error alone does not amount to "a

[5] This was actually the *fourth* ruling by the Eleventh Circuit denying the COA for the same reason. *See* App. 1a, 5a, 7a, 8a.

substantial showing of the denial of a constitutional right"—the same reason it gave more than a year earlier when it denied the COA the first time. *Id.* (quoting 28 U.S.C. § 2253(c)). The court relied heavily on cases involving challenges to errors in the application of the Guidelines, which it said were " 'generally not cognizable in a collateral attack.' " *Id.* (quoting *Buggs v. United States*, 153 F.3d 439, 443 (7th Cir. 1998)). The court also rejected the ineffective assistance claim, reasoning that because its precedents (since abrogated) had foreclosed Hunter's arguments on direct review, his counsel could not have been ineffective for failing to raise them. *Id.* at 4a.

5. Pending before this Court is another petition for a writ of certiorari to the Eleventh Circuit, *Watts v. United States*, No. 08-7757, which presents the identical issue: whether carrying a concealed weapon is an ACCA predicate offense. Because of the close similarity and precedential relationship between these cases, the disposition of *Watts* will have a significant bearing on the disposition of this matter. In her response to the *Watts* petition, the Solicitor General stated that the denial of the COA was an error *both in* Watts *and in this case.*

Like Hunter, Watts was convicted of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) and erroneously sentenced as an armed career criminal to a mandatory minimum term of 15 years based, in part, on the determination that a prior concealed weapon conviction was a predicate felony under ACCA. After the Eleventh Circuit affirmed Watts's sentence in reliance on *Hall*, it affirmed the denial of habeas relief and denied his request for a COA.

In May 2009, the Solicitor General confessed error, asking this Court to GVR the petition in *Watts* with explicit directions to the court of appeals to issue a COA. The government reasoned that the decisions of this Court in *Begay* and the Eleventh Circuit in *Archer* held that a concealed weapon conviction does not qualify as an ACCA predicate offense as a matter of law. Contrary to the Eleventh Circuit's ruling, those precedents provided grounds for a "substantial showing" that Watts's sentence violated due process, entitling him to a COA. According to the government, the erroneous application of ACCA presents an issue of constitutional magnitude, because the resulting sentence both exceeded "the maximum term authorized by law," and "deprive[d] . . . the court [of its] discretion to impose a lower sentence than the maximum." Brief of the United States, dated May 2009 ("U.S. *Watts* Br.") at 8-9 (citing *Whalen v. United States*, 445 U.S. 684, 690 (1980) and *Hicks v. Oklahoma*, 447 U.S. 343, 346-47 (1980)). The government further explained that *Begay* and *Archer* should be given retroactive effect as substantive sentencing rules. *See id.* at 10 (citing *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004); *Bousley v. United States*, 523 U.S. 614, 620-21 (1998)).[6] The government expressly rejected the Eleventh Circuit's reliance on Guidelines cases because those decisions concerned the misapplication of law within a court's sentencing authority, while the ACCA error increased the statutory maximum. *Id.* at 7.

Recognizing that the decision below in *Hunter* presented precisely the same issue, the government

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[6] In any event, the Solicitor General stated that she would not rely on *Teague v. Lane*, 489 U.S. 288 (1989), as a procedural bar to the issuance of a COA in *Watts*. *Id.* at 13.

made clear that the Eleventh Circuit's denial of a COA in this case was equally wrong. "The sentencing errors both [in *Watts*] and in *Hunter* implicate the defendants' due process rights and give rise to a substantial showing of the denial of a constitutional violation." *Id.* at 11.

The Solicitor General concluded her submission in *Watts* with an unusual and expansive request for remedial action. First, she asked the Court to GVR the case with explicit instructions to the court of appeals to issue a COA. *Id.* at 11. She explained that this was necessary because the Eleventh Circuit would otherwise be bound by its incorrect decision in this case. Next, she recommended that the Eleventh Circuit remand the case to the district court to allow reconsideration of the constitutional claim under the change in law effected by *Begay* and *Archer*. As a final step, the Solicitor General suggested that, on remand to the district court, she would not oppose the court's consideration of a claim for collateral relief based upon the statutory ground that the sentence was in "excess of the maximum authorized by law," which would avoid the constitutional issue. *Id.* at 13 (quoting 28 U.S.C. § 2255(a)). *Watts* remains pending before this Court.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's refusal to grant Hunter a COA to allow him to challenge a concededly unlawful and plainly unjust sentence constitutes a clear error of law that warrants review and a summary reversal by this Court.

There is no dispute that Hunter's sentencing to a mandatory 15-year term was erroneous as a matter of law. In the decision below, following this Court's prior order of remand, the Eleventh Circuit acknowledged that it was a legal error to sentence Hunter as an armed career criminal under the recidivist enhancement provision of ACCA. The result of that error was to impose a sentence that exceeds by more than five years the maximum sentence available under a correct application of the law. In addition, the district court was deprived of its discretion to impose a far shorter sentence. Under the most fundamental principles of due process and justice, Hunter's illegal sentence cannot stand. There is simply no legal doctrine or constitutional basis that can justify preserving a sentence that would incarcerate Hunter, depriving him of his liberty, for a term that far exceeds the maximum punishment that is allowed by applicable law.

Accordingly, the error in the Eleventh Circuit's refusal to grant a COA and allow collateral review of Hunter's unauthorized sentence is apparent. The Solicitor General has conceded in *Watts* that the erroneous application of the career criminal enhancement provision in ACCA is a violation of potentially constitutional dimension. She further has conceded that the substantive rulings in *Begay* and *Archer* are retroactively applicable on habeas review. Thus, she

has agreed in these circumstances that there is a "substantial showing of the denial of a constitutional right" required for a COA. Therefore, there can be no dispute that Hunter has met the standard for a COA because, at the least, "reasonable jurists [can] debate" that the denial of Hunter's habeas petition "should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

The fundamental liberty interests that are at stake here, as well as the government's unqualified confession of error, justify—indeed require—a remedy that will promptly rectify the errors by the courts below. A summary reversal of the court of appeals' ruling and issuance of a COA is the first and necessary step. The government has proposed further remedial action in the companion case of *Watts* that is equally just and appropriate here. The court of appeals should return the matter to the district court so that Hunter's habeas application may be reconsidered and, ultimately, he may be resentenced de novo.

I. HUNTER'S ENHANCED SENTENCE UNDER ACCA IS ERRONEOUS AS A MATTER OF LAW AND VIOLATES HIS DUE PROCESS RIGHTS.

In the absence of ACCA, Hunter faced a statutory sentencing range of zero to 10 years' imprisonment for his offense of conviction. But the application of ACCA elevated his statutory sentencing range to a minimum term of 15 years. That interpretation was erroneous as a matter of law. Furthermore, because

the resulting sentence violated due process, Hunter was entitled to a COA on his claim that he should have been sentenced to a lower term.

A. The Misapplication of ACCA to Enhance Hunter's Sentence Is an Undisputed Error of Law.

In *Begay*, this Court significantly narrowed the class of crimes that would qualify as predicate offenses under the residual clause of ACCA, 18 U.S.C. § 924(e)(2)(B)(ii). To warrant an enhancement based upon a prior "violent felony" offense—an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another"—the prior offense must be similar in kind, and in degree of risk posed, to the examples of burglary, arson, extortion, and offenses involving the use of explosives enumerated in the statute. 128 S. Ct. at 1584-85. Because ACCA is concerned with punishing offenders who create a special risk of public harm by virtue of their prior criminal history, qualifying predicate offenses "typically involve purposeful, violent, and aggressive conduct." *Id.* at 1587 (internal quotation marks omitted). Viewing ACCA in light of this purpose, this Court in *Begay* held that the crime of driving while under the influence of alcohol or drugs did not constitute a "violent felony" within the meaning of the statute, because it differed from the category of intentional offenses typically associated with a likelihood of future violent conduct.

Since *Begay*, the circuits that have addressed the issue in the firearm context have unanimously held that a weapon possession offense does not qualify as a violent felony under ACCA because it consti-

tutes a passive act that does not, without more, involve purposeful, violent, or aggressive conduct. *See, e.g.*, *United States v. Serafin*, 562 F.3d 1105 (10th Cir. 2009) (possession of an unregistered weapon is not a violent felony under ACCA); *United States v. Haste*, 292 F. App'x 249 (4th Cir. 2008) (possession of a weapon of mass destruction is not a violent felony under ACCA); *see also United States v. Flores*, 477 F.3d 431 (6th Cir. 2007) (before *Begay*, ruling that carrying a concealed weapon is not a violent felony under ACCA); *United States v. Whitfield*, 907 F.2d 798 (8th Cir. 1990) (same). The Solicitor General has agreed, explaining that under the standard articulated by this Court in *Begay*, carrying a concealed weapon is not a qualifying offense under ACCA. U.S. *Watts* Br. at 10.

The Eleventh Circuit itself now concedes that its pre-*Begay* precedents were wrong. In *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008), the court already acknowledged that carrying a concealed weapon cannot be considered a "crime of violence" under the career offender enhancement of the Sentencing Guidelines, and that therefore its prior holdings to the contrary (in the context of the Guidelines and ACCA) have been "undermined to the point of abrogation." *Id.* at 1352. In the decision below, the court conceded there was "good reason to conclude that Hunter was erroneously sentenced as an armed career criminal." App. 2a. Now, in the few months since that decision, the Eleventh Circuit has flatly held that carrying a concealed weapon is not an ACCA predicate. *See Townsley*, 2009 WL 929986, at *3 (vacating enhanced sentence where prior concealed weapon offense was counted as a violent felony); *United States v. Redeemer*, No. 07-15837,

2009 WL 684749, at *1 (11th Cir. Mar. 17, 2009) (unpublished) (same).

Accordingly, this is a case in which all legal authorities—including the very court whose decision is under review—agree that the statutory basis for the imposed sentence is wrong. And yet, the Eleventh Circuit refused to allow Hunter even to argue that he should be resentenced in accordance with the law.

B. The Erroneous Application of ACCA Violated Hunter's Due Process Rights.

The Eleventh Circuit erred when it held that the admittedly improper application of ACCA's sentencing enhancement did not violate Hunter's due process rights. As the Solicitor General has demonstrated, this Court's precedents hold that sentencing a defendant to a term of imprisonment based upon a statute that indisputably does not apply to him violates basic principles of due process. U.S. *Watts* Br. at 8-11.

In *Whalen v. United States*, 445 U.S. 684 (1980), this Court articulated the fundamental rule that a defendant has a "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress."[7] 445 U.S. at

[7] In *Whalen*, the defendant was erroneously sentenced to consecutive prison terms for murder and rape, the latter of which should have been merged into the former for sentencing purposes. *Id.* at 686-87 The Court reversed the defendant's sentence because of the "guarantee against double jeopardy, [and] also the constitutional principle of separation of powers," *id.* at 689, noting that although states are not bound by the doctrine of separation of powers, "[t]he Due Process Clause of the Fourteenth Amendment . . . would presumably prohibit state courts

690. Within the federal constitutional framework, "the legislative power, including the power to define criminal offenses and to prescribe punishments to be imposed upon those found guilty of them, resides wholly with the Congress." *Id.* at 689. Where a court exceeds its sentencing authority by imposing punishment more severe than Congress contemplated, it "trenches particularly harshly on individual liberty." *Id.* Accordingly, no criminal defendant can be subject to a penalty of imprisonment in the absence of a clear legislative mandate authorizing such a penalty.

This Court set forth a related principle in *Hicks v. Oklahoma*, 447 U.S. 343 (1980), which held that a habitual offender is denied due process when the sentencer is erroneously prevented from exercising its statutory discretion to impose a lesser sentence. *Id.* at 346-47. The defendant in *Hicks* was sentenced to a 40-year mandatory minimum prison term under a state habitual offender statute that was declared unconstitutional subsequent to his conviction. *Id.* at 344-45. The state appellate court affirmed, reasoning that because the sentence was within the range of punishment available, the jury might have exercised its discretion to impose the same sentence. *Id.* at 345. Reversing, this Court observed that a defendant has a substantial and legitimate expectation that he will be sentenced within a legal framework that properly defines the upper and lower limits of the district court's discretion. *Id.* at 346. Recognizing the fundamental unfairness of a sentence that is fashioned based upon the district court's misapprehension of its own sentencing authority, this

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from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law." *Id.* at 689 n.4.

Court held that the defendant in *Hicks* was denied his right to "be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." *Id.*

A number of circuits have followed the lessons in these cases and held that sentences imposed inconsistently with the law violate due process. The Tenth Circuit, citing *Whalen* and *Hicks*, held that when a defendant "receive[s] a sentence patently in excess of the maximum permitted[, t]his claim implicates due process concerns" and requires a resentencing in which the improper enhancement is not considered. *Richardson v. Evans*, 99 F.3d 1150, 1996 WL 603278, at *4 (10th Cir. 1996) (unpublished).[8] The Ninth Circuit followed *Hicks* and *Whalen* in reversing a sentence erroneously altered by the state Department of Corrections under the wrong California statute, stating that because the defendant had "a liberty interest in the correct sentence of eight months, it was a due process violation to order him to a full two-year term." *Wasko v. Vasquez*, 820 F.2d 1090, 1091 n.2 (9th Cir. 1987). Other courts have held the same in analogous contexts. *See United States v. Eakman*, 378 F.3d 294, 296-97 (3d Cir. 2004) (granting defendant's motion for habeas relief

[8] In *Richardson*, the defendant challenged his sentencing enhancement under Oklahoma's subsequent offender statute, where the prior conviction that provided the basis for his enhancement was a nonqualifying misdemeanor under Oklahoma law, but a qualifying felony under Texas law. 1996 WL 603278, at *3. The Tenth Circuit remanded the case for resentencing upon defendant's 28 U.S.C. § 2254 petition, stating that "[t]he Due Process Clause of the Fourteenth Amendment prohibits state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law." *Id.* at *4.

because the sentencing court violated his due process rights by relying upon its own misunderstanding of the Bureau of Prisons' authority to assign a prisoner to a community corrections center, and thus denied him the ability to argue for a downward departure); *Jones v. Arkansas*, 929 F.2d 375, 377-78 (8th Cir. 1991) (reversing defendant's erroneous sentence under the Arkansas habitual offender statute and holding that he was "denied due process because he was sentenced under a statute that was not in effect at the time he committed his crime").[9]

Imposing punishment inconsistent with what the law authorizes raises distinct constitutional concerns in a variety of other contexts. For instance, this Court has held that a convicted felon's involuntary commitment violates due process when it occurs without evidence that he is mentally ill. *Vitek v. Jones*, 445 U.S. 480 (1980). This is because "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action," and a defendant has the constitutional right to be punished in a way that is reasonably related to the pur-

[9] Similarly, the circuits have adhered to this Court's teaching in *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948), that a sentence violates due process when it is premised upon erroneous facts. *See, e.g., King v. Hoke*, 825 F.2d 720, 724-25 (2d Cir. 1987) (observing that "it is well-established that '[m]isinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process' ") (citation omitted); *Johnson v. United States*, 805 F.2d 1284, 1288 (7th Cir. 1986) (noting that a defendant may be entitled to assert a challenge to his sentence under 28 U.S.C. § 2255 if "the district court relied on false information in sentencing him, [because] he may have been denied due process of law").

pose of his punishment. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *see also Jones v. United States*, 463 U.S. 354, 361 (1983). This Court has extended due process protections to similar types of governmental actions that restrict a defendant's liberty beyond what the law allows, including decisions that improperly revoke parole, *see Morrissey v. Brewer*, 408 U.S. 471 (1972), revoke probation, *see Gagnon v. Scarpelli*, 411 U.S. 778 (1973), eliminate good-time credits, or impose solitary confinement, *see Wolff v. McDonnell*, 418 U.S. 539 (1974).[10]

The Eleventh Circuit ignored these fundamental principles when it held that the acknowledged sentencing error here is of the type "generally not cognizable in a collateral attack." App. 4a. In doing so, it relied upon cases stating that errors in the application of the Sentencing Guidelines are generally not subject to collateral attack. *Id.* (citing *United States v. Cepero*, 224 F.3d 256, 267-68 (3d Cir. 2000); *Buggs v. United States*, 153 F.3d 439, 443 (7th Cir. 1998); *United States v. Segler*, 37 F.3d 1131, 1134 (5th Cir. 1994)). These decisions, however, are inap-

[10] In a parallel context, this Court has prohibited imposing "grossly excessive" punishment upon tortfeasors, recognizing that due process creates substantive limits beyond which certain penalties may not go. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453-55 (1993). Thus, a court may not award punitive damages in a way that amounts to changing the nature of the conduct for which the tortfeasors were found responsible and deprives them of property without due process. *See United States v. Bajakajian*, 524 U.S. 321, 324 (1998); *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996). Similarly, this Court has applied due process protections to punitive forfeitures of property when they are not authorized by law. *See Peisch v. Ware*, 8 U.S. (4 Cranch) 347 (1808); *see also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 688-90 (1974); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 490-91 (1915).

posite. As the government observed in *Watts*, the authorities cited by the Eleventh Circuit involved technical misapplications of the Sentencing Guidelines and concerned sentences that were within the court's authority and discretion to impose. U.S. *Watts* Br. at 7. By contrast, the excessive sentences under ACCA at issue in *Watts* and here were beyond the court's authority and discretion to impose. Accordingly, the Eleventh Circuit's improper application of ACCA to Hunter's sentence violated his due process rights.

C. Hunter Has Established Grounds for a Certificate of Appealability.

As demonstrated above, Hunter's sentence in excess of the maximum term authorized by law violates due process. In order to qualify for a COA, however, Hunter is required to make only a "*substantial showing* of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (emphasis added). The test is whether "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack*, 529 U.S. at 483-84 (internal quotation marks omitted). Recognizing the strength of the precedents on Hunter's side, the Solicitor General conceded in *Watts* that Hunter has "at least" done that. U.S. *Watts* Br. at 8, 10. Accordingly, Hunter should have been granted a COA.[11]

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[11] The government indicated in *Watts* that it would not rely upon the procedural bar in *Teague v. Lane*, 489 U.S. 288 (1989), which precludes the application of intervening precedent on collateral review in certain cases. U.S *Watts* Br. at 13 n.6 (citing *Danforth v. Minnesota*, 128 S. Ct. 1029, 1046 (2008)). Presum-

II. THIS COURT SHOULD SUMMARILY REVERSE THE DECISION BELOW.

The most appropriate and expeditious disposition of this case would be for this Court to grant the writ and summarily reverse the Eleventh Circuit's decision. This case, in fact, presents the classic situation warranting a summary reversal, which has been described as the "kind of reversal order [that] usually reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time." Eugene Gressman et al., *Supreme Court Practice* 344-45 (9th ed. 2007) (also noting that summary reversal is appropriate when federal respondents have confessed error).[12] The Eleventh Circuit's decision that Hunter could not make a substantial showing of a constitutional violation was manifestly wrong, as the Solicitor General has conceded in *Watts*. Moreover, it is a decision to which the Eleventh Circuit has

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ably, it will take the same position here as a matter of equity. In any event, as the government concedes, *Teague* would not apply because the decisions in *Begay* and *Archer* constitute substantive holdings concerning eligibility for a recidivist enhancement that are entitled to retroactive effect on collateral review. *Id.* at 10 & 13 n.6. *See Schriro*, 542 U.S. at 353 ("A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes"); *Bousley*, 523 U.S. at 620-21 ("decisions of this Court holding that a substantive federal criminal statute does not reach certain conduct" are retroactive on collateral review).

[12] *See, e.g.*, *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (explaining that summary reversal was appropriate because the case did not "decide any new or unanswered question of law, but simply correct[ed] a lower court's demonstrably erroneous application of federal law").

incorrectly adhered in four separate rulings—both before this Court's GVR and after.[13]

The Solicitor General has indicated that after remand in *Watts*, she would ask the Eleventh Circuit to remand the matter to the district court for consideration of the due process claim in light of *Begay* and the Eleventh Circuit's decision in *Archer*. She further has submitted that, on remand, habeas relief may be available under the non-constitutional ground in § 2255(a) authorizing relief from a sentence "in excess of the maximum authorized by law." *See* U.S. *Watts* Br. at 13; *see also Mateo v. United States*, 310 F.3d 39 (1st Cir. 2002) (*Mateo I*), and *Mateo v. United States*, 276 F. Supp. 2d 186 (D. Mass. 2003) (*Mateo II*), *aff'd*, F.3d 126 (1st Cir. 2005) (holding that if, on a "quick look," a habeas petitioner's constitutional claim is not completely without merit, the appellate court should grant the COA and remand, whereupon the district court should consider both constitutional and non-constitutional arguments for habeas relief). Indeed, the Solicitor General has stated that she would not oppose such reconsideration "on the facts of this case." That same course of action should be followed here, allowing Hunter to obtain habeas relief from his equally excessive sentence.

[13] As an alternative to summary reversal, Hunter's petition could be granted and the case set for plenary review.

CONCLUSION

For all the aforementioned reasons, the petition for a writ of certiorari should be granted.

July 24, 2009

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ON REMAND DENYING CERTIFICATE OF APPEALABILITY, NO. 07-13701-J (11TH CIR.), DATED FEB. 24, 2009

Caption Omitted

Before TJOFLAT, PRYOR and ANDERSON, Circuit Judges.

This appeal presents the issue whether a criminal defendant who was erroneously sentenced has made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Demarick Hunter is a federal prisoner serving a sentence of imprisonment of 188 months for being a felon in possession of a firearm, 18 U.S.C. § 924(g). He moved to vacate his sentence, 28 U.S.C. § 2255, and the district court denied his motion. Hunter then sought a certificate of appealability from this Court, and we denied the application. The Supreme Court vacated our order denying the certificate of appealability and remanded for reconsideration in the light of its decision in *Begay v. United States*, 553 U.S. ___, 128 S. Ct. 1581 (2008), which held that driving under the influence was not a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e). Because Hunter has failed to make "a substantial showing of the denial of a constitutional right," we deny his motion for a certificate of appealability.

Hunter requests a certificate of appealability for two issues that are relevant to the decision of the Supreme Court in *Begay*. First, Hunter contends that his due process rights were violated when he was sentenced as an armed career criminal based on two prior convictions for carrying a concealed weapon. Second, Hunter argues that his appellate counsel was ineffective for failing to object to the use of his prior firearms convictions in determining that he was subject to an armed career criminal enhancement. Neither argument involves a substantial showing of the denial of a constitutional right.

Before the decision of the Supreme Court in *Begay*, we held that carrying a concealed weapon was a violent felony under the Armed Career Criminal Act, *United States v. Hall*, 77 F.3d 398, 401 (11th Cir. 1996), and was a "crime of violence" under the Sentencing Guidelines, *United States v. Gilbert*, 138 F.3d 1371, 1372 (11th Cir. 1998). After *Begay*, a panel of this Court determined that these prior panel precedents had been undermined to the point of abrogation by the decision of the Supreme Court. *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). This Court also stated, in dicta, that carrying a concealed weapon is not a violent felony under the Armed Career Criminal Act. *Id.*

Although *Begay* provides good reason to conclude that Hunter was erroneously sentenced as an armed career criminal, a sentencing error alone does not amount to "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Before Congress enacted the Antiterrorism and Effective Death Penalty Act, *id.*, the decision of the Supreme Court in *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct.

3383 (1983), provided the standard for granting a certificate of probable cause, which required a petitioner to make a "substantial showing of the denial of a federal right." *Id.* at 893, 103 S. Ct at 3394 (internal quotation marks omitted). The Antiterrorism and Effective Death Penalty Act substituted the narrower term "constitutional" for the term "federal":

> Under AEDPA, a COA may not issue unless "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c). Except for substituting the word "constitutional" for the word "federal," § 2253 is a codification of the CPC standard announced in *Barefoot v. Estelle*. Congress had before it the meaning *Barefoot* had given to the words it selected; and we give the language found in § 2253(c) the meaning ascribed it in *Barefoot*, with due note for the substitution of the word "constitutional."

Slack v. McDaniel, 529 U.S. 473, 483, 120 S. Ct. 1595, 1603 (2000) (citation omitted). "The term 'constitutional right' means something very different from the term 'federal right,' and because we must assume Congress 'means in a statute what it says,' *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254, 112 S. Ct. 1146, 1149-50 (1992), we give effect to the change." *United States v. Cepero*, 224 F.3d 263, 264 (3d Cir. 2000) (en banc). We may issue a certificate of appealability only where a petitioner makes "a substantial showing of the denial of a *constitutional* right." 28 U.S.C. § 2253(c) (emphasis added).

Although Hunter presents his arguments for a certificate of appealability as involving a denial of due process and ineffective assistance of counsel, Hunter's sentencing error did not give rise to a violation of the Constitution. Hunter was afforded due process at his sentencing hearing, and sentencing errors "are generally not cognizable in a collateral attack." *Buggs v. United States*, 153 F.3d 439, 443 (7th Cir. 1998); *see also Cepero*, 224 F.3d at 267-68; *United States v. Segler*, 37 F.3d 1131, 1134 (5th Cir. 1994). To prevail on a claim of ineffective assistance of counsel, Hunter must prove that " 'no competent counsel would have taken the action that his counsel did take.' " *Ford v. Hall*, 546 F.3d 1326, 1333 (11th Cir. 2008) (quoting *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc)). Hunter cannot satisfy that burden because, when his original sentence and direct appeal occurred, our precedent, *Hall*, 77 F.3d 398, foreclosed the argument that carrying a concealed weapon was not a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e).

Hunter's application for a certificate of appealability is **DENIED.**

ORDER OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT ON REMAND DENYING CERTIFICATE OF APPEALABILITY, NO. 07-13701-J (11TH CIR.), DATED FEB. 4, 2009

Caption Omitted

Before PRYOR and ANDERSON, Circuit Judges.

BY THE COURT:

This appeal is on remand from the Supreme Court of the United States, which vacated our earlier judgment denying a certificate of appealability and remanded for reconsideration in the light of *Begay v. United States*, 128 S.Ct. 1581 (2008). Upon reconsideration, Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

ORDER OF THE SUPREME COURT GRANTING PETITION FOR WRIT OF CERTIORARI, VACATING, AND REMANDING, NO. 07-11550 (S. CT.), DATED NOV. 17, 2008

Caption Omitted

JUDGES: Roberts, Stevens, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Alito.

OPINION

On petition for writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari granted. Judgment vacated, and case remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Begay v. United States*, 553 U.S. ___, 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008).

ORDER OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION FOR RECONSIDERATION, NO. 07-13701-J (11TH CIR.), DATED JAN. 24, 2008

Caption Omitted

Before ANDERSON and PRYOR, Circuit Judges.

BY THE COURT

Appellant has filed a motion for reconsideration of this Court's order dated December 4, 2007. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065, 80 L.Ed.2d 674 (1984); *United States v. Hall*, 77 F.3d 398, 401 (11th Cir. 1996).

ORDER OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION FOR CERTIFICATE OF APPEALABILITY, NO. 07-13701-J (11TH CIR.), DATED DEC. 4, 2007

Caption Omitted

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

By: /s/ WILLIAM H. PRYOR, JR.
UNITED STATES CIRCUIT JUDGE

ORDER OF THE DISTRICT COURT DENYING MOTION FOR CERTIFICATE OF APPEALABILITY, NO. 06-22555-CIV-UUB (S.D. FLA.), DATED AUG. 6, 2007

Caption Omitted

THIS CAUSE is before the Court upon Movant's Motion for Certificate of Appealability. DE 18. The Court, having considered the Motion and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Movant's Motion (DE 18) is DENIED. Movant has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

DONE AND ORDERED in Chambers at Miami, Florida, this 6th day of August, 2007.

Signature Omitted

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

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ORDER OF THE DISTRICT COURT AFFIRMING REPORT OF MAGISTRATE JUDGE, NO. 06-22555-CIV-UUB (S.D. FLA.), DATED APRIL 16, 2007

Caption Omitted

THIS CAUSE is before the Court on Movant's Motion under 28 U.S.C. § 2255. DE 1. The matter was referred to Magistrate Judge White, who on March 20, 2007, issued a Report (DE 10) recommending that the Motion be denied. *See* DE 10 (Report) at 7. The parties have not objected to the Report.[1]

Accordingly, having conducted a *de novo* review of the record and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Magistrate Judge's Report (DE 10) is RATIFIED, AFFIRMED AND ADOPTED. It is further

ORDERED AND ADJUDGED that Movant's Motion under 28 U.S.C. § 2255 (DE 1) is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 16th day of April, 2007.

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[1] The Court has considered Movant's Motion (DE 12) seeking reconsideration of the Report in light of Movant's "Traverse" (DE 11). However, Movant's arguments do not affect the analyses upon which the Report is based. *Compare* DE 10 (Report), *with* DE 11 (Traverse).

Signature Omitted

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

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REPORT OF MAGISTRATE JUDGE ON MOTION UNDER 28 U.S.C. § 2255, NO. 06-22555-CIV-UUB (S.D. FLA.), DATED MARCH 20, 2007

Hunter Demarick, a federal prisoner currently confined at the Federal Correctional Camp in Coleman, Florida, filed a *pro se* motion to vacate pursuant to 28 U.S.C. § 2255, attacking his conviction and sentence imposed upon a jury verdict of guilty entered in Case No. 03-20712-Cr-Ungaro-Benages.

This Cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2255 Proceedings for the United States District Courts.

For its consideration of the motion and memorandum in support thereof and the movant's emergency motion for leave to amend, the Court has the government's response to an order to show cause and the underlying criminal file.

Demarick raises five claims as follow:

1. His sentence was imposed in violation of the Fifth Amendment because he was sentenced as an armed career criminal based upon two State convictions for carrying a concealed weapon.

2. He received ineffective assistance of counsel when counsel failed to challenge the use of his prior convictions for carrying a concealed firearm to determine his status as an

armed career criminal and when counsel failed to pursue his right to a speedy trial under the Speedy Trial Act.

3. His conviction was obtained in violation of the Speedy Trial Act.

4. He received ineffective assistance of appellate counsel when counsel failed to challenge his sentence which was imposed upon a finding that he is an armed career and failed to challenge his conviction based upon a violation of the Speedy Trial Act.

5. He received ineffective assistance of appellate counsel when counsel failed to challenge his sentence based upon the Supreme Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), where the Supreme Court found that driving while intoxicated resulting in serious bodily injury did not constitute a crime a violence for purposes of whether the commission of an aggravated felony warrants deportation under the Immigration and Naturalization Act.

Demarick was charged by indictment with being a convicted felon in possession of a firearm in and affecting commerce. (Cr. DE# 7). He proceeded to trial by jury and was found guilty as charged. (Cr. DE# 81). The Court sentenced him to 188 months imprisonment, followed by five years of supervised release. (Cr. DE# 89). His conviction and sentence were affirmed, and this timely motion to vacate ensued.

Demarick challenges his conviction and sentence, arguing both substantive error and ineffective assistance of trial and appellate counsel for failing to raise those claims. In order to prevail on a claim of ineffective assistance of counsel, Demarick must establish that (1) his counsel's representation fell below an objective standard of reasonableness, and (2) but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Thus, Demarick must show that his counsel's performance was below constitutional standards and that he suffered prejudice as a result. A court may decline to reach the performance prong of the standard if it is convinced that the prejudice prong cannot be satisfied. *Id.* at 697; *Waters v. Thomas*, 46 F.3d 1506, 1510 (11th Cir. 1995).

The standard for a claim of ineffective assistance on direct appeal is the same as that for ineffective assistance at trial. *Matire v. Wainwright*, 811 F.2d 1430, 1435 (11th Cir. 1987). There is no duty to raise issues on appeal which have little or no chance of success. Thus, appellate counsel is not required to raise meritless issues, *Card v. Dugger*, 911 F.2d 1494, 1520 (11th Cir. 1990), or issues which were not preserved and are procedurally barred on appeal, *Bertolotti v. Dugger*, 883 F.2d 1503, 1523 (11th Cir. 1989), *cert. denied*, 497 U.S. 1032 (1990); *Jackson v. Dugger*, 931 F.2d 712, 715 (11th Cir. 1991).

Demarick argues in his first claim that his sentence was imposed in violation of the Fifth Amendment because he was sentenced as an armed career offender based upon two prior convictions for car-

rying a concealed firearm, which should not have been counted as crimes of violence necessary for satisfying the armed career offender requirement. He argues in his second claim that trial counsel was ineffective for failing to challenge the use of the convictions at sentencing and that appellate counsel was ineffective for failing to raise the claim on appeal.

His argument is contrary to Eleventh Circuit precedent. In *United States v. Hall, et al.*, 77 F.3d 398 (11th Cir. 1996), the Eleventh Circuit rejected the same claim raised by defendant McKinney. McKinney was convicted of being a felon in possession of a firearm and classified as an armed career criminal at sentencing, based in part upon his prior conviction for carrying a concealed firearm. Like Demarick, McKinney relied upon *United States v. Oliver*, 20 F.3d 415 (11th Cir. 1994) to support his argument that carrying a concealed firearm was not violent felony because the Court had concluded in *Oliver* that possession of a firearm by a convicted felon was not a violent felony. The Eleventh Circuit rejected the argument because the conduct poses serious potential risk of physical injury based upon the act of readiness or immediate accessibility for use on another. Thus, the Court concluded that such an offense falls under the definition of violent felony. It expressly held that the district court did not err in using the prior conviction for carrying a concealed weapon to enhance the sentence under the Armed Career Criminal Act.

Likewise, the Court did not err in sentencing Demarick as an armed career criminal based upon his prior convictions for carrying a concealed

weapon. Neither trial nor appellate counsel were ineffective for failing to raise the nonmeritorious claim at sentencing or on appeal.

In his third claim, Demarick argues that his conviction was obtained in violation of the Speedy Trial Act. He argues in his second claim that trial counsel was ineffective for failing to raise the claim at trial and in his fourth claim he argues that appellate counsel was ineffective for failing to raise the claim on appeal.

The Speedy Trial Act, codified at 18 U.S.C. § 3161, requires that the trial of any indicted defendant commence within seventy days from the latter of either the filing date of the indictment or the date on which the defendant first appears before the court in which that case was pending. 18 U.S.C. § 3161(c)(l). In cases involving multiple defendants, the seventy-day time limit begins to run when the last codefendant is indicted or arraigned. 18 U.S.C. § 3151(h)(7); *See also Henderson v. United States*, 476 U.S. 321, 323, n.2 (1986).

Certain periods of delay are excludable from the calculation of the seventy-day limit. 18 U.S.C. § 3161(h). Delay resulting from the filing of a pretrial motion through the disposition of such a motion or delay resulting from the unavailability of the defendant or an essential witness is excludable time under the Speedy Trial Act. 18 U.S.C. § 3161(h)(1)(F) and (h)(3)(A). Periods of delay resulting from a requested continuance where the court finds that the ends of justice outweigh the best interest of the public and the defendant in a speedy trial are also excludable. 18 U.S.C. § 3161(h)(8)(A). Any excludable delay attributable to one defendant

tolls the speedy trial clock for all codefendants. *See United States v. Twitty*, 107 F.3d at 1488, *United States v. Schlei*, 122 F.3d 944, 985 n.15 (11th Cir. 1997); *United States v. Varella*, 692 F.2d, 1352, 1359 (11th Cir. 1982), *cert. denied*, 464 U.S. 838 (1983).

Demarick's first appearance was August 19, 2003. The 70-day speedy trial period expired on October 28, 2003. On October 27, 2003, Demarick, through counsel, filed a motion to suppress evidence. (Cr. DE# 22). An evidentiary hearing was held on the motion and a report and recommendation was entered on December 31, 2003. Demarick's attorney subsequently filed a motion to continue trial and to extend the time for filing objections to the report on the motion to suppress. (Cr. DE# 48). The motion was granted, and objections were filed on January 16, 2004. (Cr. DE#s 51 and 52). The government's response was filed on January 22, 2004. (Cr. DE# 53). On January 23 and 27, 2004, sealed documents were filed, including an *ex parte* motion to withdraw as counsel. (Cr. DE#s 54, 55, 56 and 59). A continuance was granted and new counsel was appointed. (Cr. DE# 58, 61, 62, and 64). The motion to suppress was denied on May 4, 2004. (Cr. DE# 71). In the meantime, Demarick filed a motion to order a government witness to appear for a psychiatric evaluation. (Cr. DE# 67). The government filed a response and was subsequently ordered to file a more definite response regarding whether or not the witness would be called at trial. (Cr. DE#s 70 and 72). A response to the order was filed on May 10, 2004. Trial of this matter commenced on June 7, 2004. During the course of pretrial proceedings, calendar calls were regularly held, and based upon the rep-

resentations of counsel at the calendar call and alternately the representations of counsel in the various motions for continuance, trial was continued with the proviso that the continuances were in the interest of justice and that time was excludable under the Speedy Trial Act. Demarick has not shown that the excluded time periods were in violation of the Speedy Trial Act.

The Court did not violate the Speedy Trial Act, and neither trial nor defense counsel were ineffective for failing to raise the claim. Demarick is not entitled to relief on his second third or fourth claims.

In his fifth claim, Demarick argues that he received ineffective assistance of appellate counsel when counsel failed to challenge his sentence based upon the Supreme Court's decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). The Supreme Court held that driving while intoxicated resulting in serious bodily injury did not constitute a crime a violence for purposes of whether the commission of an aggravated felony warrants deportation under the Immigration and Naturalization Act. *Id.* There was no reason for appellate counsel to make such an argument, as the facts are totally distinguishable from those in Demarick's case. Demarick is not entitled to relief on his fifth claim.

It is therefore recommended that the motion to vacate be denied.

Objections to this report may be filed with the District Judge within ten days of receipt of a copy of the report.

Signed in chambers at Miami, Florida, this 20th day of March, 2007.

Signature Omitted

Copies Omitted